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**UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS**

No. 18-0443

SAMUEL L. KRAFT, APPELLANT,

v.

ROBERT L. WILKIE,  
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before SCHOELEN, *Judge*.

**MEMORANDUM DECISION**

*Note: Pursuant to U.S. Vet. App. R. 30(a),  
this action may not be cited as precedent.*

SCHOELEN, *Judge*: The appellant, through counsel, appeals an October 20, 2017, Board of Veterans' Appeals (Board) decision, in which the Board denied entitlement to a disability rating in excess of 30% for service-connected headaches and denied entitlement to service connection for a heart disorder, to include coronary artery disease (CAD).<sup>1</sup> Record of Proceedings (R.) at 2-17. Because of inadequate reasons or bases, the Court vacates the portion of the Board's decision that denied a disability rating in excess of 30% for headaches and affirms the Board's decision denying entitlement to service connection for a heart disorder, to include CAD.

**I. FACTS**

The appellant served on active duty in the U.S. Army from August 1986 to August 1990 and from January 1991 to March 1991. R. at 563, 1717. A May 1986 enlistment examination report shows that the appellant weighed 208 pounds and was advised to maintain an appropriate

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<sup>1</sup> The Board denied the appellant's claim for service connection for residuals from gallbladder removal. R. at 8-9. The Board also remanded the matter of entitlement to a temporary total rating due to convalescence for right knee surgery beyond October 1, 2008. R. at 14-15. This remanded matter is not before the Court. *See Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order) (a Board remand "does not represent a final decision over which this Court has jurisdiction"); *Hampton v. Gober*, 10 Vet.App. 481, 483 (1997) (claims remanded by the Board may not be reviewed by the Court).

weight. R. at 1738-39. A January 1988 periodic examination report shows that he weighed 205 pounds, and that his body fat was 21%, and that soldiers were allowed 22% body fat. R. at 1747-48. A May 1990 examination report shows that the physician noted that the appellant weighed 230 pounds, was obese, and recommended weight loss. R. at 1761-62.

A June 2002 rating decision granted service connection for headaches, residuals of trauma above right eye, effective February 13, 2002. R. at 4036.

A July 2002 private treatment record shows that the appellant was seen for followup treatment for his myocardial infarction and stenting. R. at 1182. The physical examination report noted that the appellant was obese, assessing large anterior myocardial infarction with no failure symptoms. *Id.*

In September 2015, the appellant filed a claim for service connection for a heart condition. R. at 2137. A December 2015 rating decision denied service connection for atherosclerotic heart disease. R. at 1530. The regional office (RO) stated that the evidence did not show an event, disease, or injury in service, and that his service treatment records did not contain complaints, treatment, or diagnosis for this condition. R. at 1531. The rating decision stated that there was no relationship to his military service and service connection could not be granted. *Id.*

On December 12, 2015, the appellant requested an increased disability rating for his headaches. R. at 1414. He stated that he had headaches twice per week and that, about once per month, he had to lay down to abate his headaches. *Id.* A March 17, 2016, rating decision continued the 10% disability rating for headaches, residual of trauma above right eye. R. at 1084.

In March 2016, the appellant filed a Notice of Disagreement (NOD) with the March 2016 rating decision. R. at 754-60. He sought entitlement to a higher disability rating for headaches – citing his service treatment records, an April 2002 VA examination report, and that in 2011, he was prescribed Sumatriptan for his headaches. R. at 754-55.

A June 2016 rating decision assigned a 30% disability rating for headaches, residual of trauma above right eye, effective December 12, 2015. R. at 661-66. A June 2016 Statement of the Case (SOC) granted a higher disability rating of 30% for headaches, residual of trauma above right eye, effective December 12, 2015, the date that the appellant's claim for an increased rating was received by VA. R. at 695.

On his June 2016 VA Form 9, the appellant checked Box A within Block 9, which stated: "I want to appeal all of the issues listed on the [SOC] and any [S]upplemental [SOCs] that my

local VA office sent to me." R. at 647. In Block 10, he stated that he wanted to appeal the issue of entitlement to a disability rating in excess of 30% for headaches, residual trauma above right eye. *Id.*

The October 20, 2017, Board decision denied entitlement to service connection for a heart disorder, to include CAD, and denied a disability rating in excess of 30% for headaches. R. at 2-14. Concerning the claim for service connection for a heart disorder, the Board determined that a VA examination was not required because the weight of the evidence was against finding that a heart disorder had its onset during service or within 1 year of separation from service or competent evidence "even suggesting that a heart disorder may be associated with service." R. at 6. The Board then denied the appellant's claim for service connection and noted that the appellant's service treatment records did not show any complaints, symptoms, treatment, or diagnosis for a heart disorder. R. at 10. The Board also stated that there was no competent opinion of record that "even suggests that the [appellant's] CAD even might be related to his service." *Id.* Further, the Board considered the appellant's allegation that his heart disorder was related to service, but found that he was not competent to diagnose a heart disorder or relate it to any in-service injury. *Id.* With respect to the appellant's claim for a higher disability rating for headaches, the Board noted that the appellant filed a claim for an increased disability rating for his headaches in December 2015. R. at 11. The Board discussed the evidence of record, citing the February and September 2016 VA examination reports, and determined that a disability rating higher than 30% was not warranted because the evidence did not show severe economic inadaptability under 38 C.F.R. § 4.124a, Diagnostic Code 8100. R. at 12-13. This appeal followed.

## **II. ANALYSIS**

### **A. Increased Rating for Headaches**

Generally, "the effective date of an award based on . . . a claim for increase . . . shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor." 38 U.S.C. § 5110(a). For an increased-disability rating claim,

[t]he effective date of an award of increased compensation shall be the earliest date as of which it is ascertainable that an increase in disability had occurred, if application is received within one year from such a date.

38 U.S.C. § 5110 (b); *see* 38 C.F.R. § 3.400(o)(2)(2018) (establishing that the effective date of a rating increase may date back 1 year prior to the date that the claim for increase was filed, "if it is ascertainable that an increase in disability had occurred" within that 1-year period); *see also Hart v. Mansfield*, 21 Vet.App. 505, 509 (2007) ("[T]he relevant temporal focus for adjudicating an increased-rating claim is on the evidence concerning the state of the disability from the time period one year before the claim was filed until VA makes a final decision on the claim.").

The Board is vested with jurisdiction to review "[a]ll questions in a matter which under section 511(a) of . . . title [38] is subject to decision by the Secretary." 38 U.S.C. § 7104(a). Because the Court's jurisdiction is limited to review of final Board decisions, 38 U.S.C. §§ 7252(a), 7266, "[i]t follows that where the Board does not have . . . jurisdiction, then neither does the Court," *King v. Nicholson*, 19 Vet.App. 406, 409 (2006). "It is well settled that the Court has jurisdiction to determine whether the Board had jurisdiction to take the action it takes in a decision," *Young v. Shinseki*, 25 Vet.App. 201, 203 (2012) (en banc order), and "the Court exercises de novo review over Board determinations that are critical to its jurisdiction," *Evans v. Shinseki*, 25 Vet.App. 7, 10 (2011).

As with any finding on a material issue of fact and law presented on the record, the Board must support its effective-date determination with an adequate statement of reasons or bases that enables the claimant to understand the precise basis for that determination and facilitates review in this Court. 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of evidence, account for evidence that it finds persuasive or unpersuasive, and provide reasons for its rejection of material evidence favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

The appellant asserts that, in his June 2016 VA Form 9, he appealed the issue of whether he was entitled to an effective date earlier than December 12, 2015, for his 30% disability rating for headaches. Appellant's Brief (Br.) at 2. The appellant then argues that he is entitled to an effective date earlier than December 12, 2015, for the assigned 30% disability rating for headaches. *Id.* at 6-7. The Secretary states that the appellant did not appeal the December 12, 2015, effective date, and therefore, the matter had not been in appellate status. Secretary's Br. at 9. The Secretary

therefore states that the Board properly adjudicated the appeal as to the proper disability rating assigned to his service-connected headaches. *Id.*

Here, the March 17, 2016, rating decision denied a disability rating in excess of 10% for the appellant's service-connected headaches, thereby not discussing any effective-date assignment. R. at 1084. The appellant filed an NOD with the March 2016 rating decision denying an increased disability rating for headaches, and a June 2016 SOC, along with a June 2016 rating decision, assigned a 30% disability rating, effective December 12, 2015. R. at 695. Thereafter, the appellant filed a VA Form 9 and checked Block 9, Box A, stating: "I want to appeal all of the issues listed on the [SOC] and any [S]upplemental [SOCs] that my local VA office sent to me," and in Block 10, he noted that he wished to appeal the following: "Entitlement to an evaluation in excess of 30 percent for headaches, residual trauma above right eye (also claimed as TBI)." R. at 647.

Here, the appellant's VA Form 9 was ambiguous because in Block 9 he completed Box A, for claimants wishing to appeal all issues, but then stated under Block 10 that he wished to appeal the issue of entitlement to a disability rating in excess of 30% for headaches – not mentioning the assigned effective date. R. at 647. Though the Secretary asserts that the appellant never expressed disagreement with the assigned effective date, the Board is silent on the question. "[I]t is the Board that is required to provide a complete statement of reasons or bases, and the Secretary cannot make up for its failure to do so." *Evans*, 25 Vet.App. at 16. The Court will not accept the Secretary's post hoc rationalizations in place of a silent Board decision. *See Martin v. Occupational Safety & Health Review Comm'n*, 449 U.S. 144, 156 (1991) ("[L]itigating positions are not entitled to deference when they are merely . . . counsel's 'post hoc rationalization' for agency action, advanced for the first time in the reviewing court."). The fact that the VA Form 9 was ambiguous does not absolve Board inaction; rather, ambiguity in a VA Form 9 requires Board action. *See Evans*, 25 Vet.App. at 15. Under these circumstances, the Board was obligated to address the ambiguity of the Form 9. *Id.*

Given the above, the Court finds that the Board did not provide adequate reasons or bases for its decision. The appellant makes no argument that he is entitled to a disability rating in excess of 30% and the Court will not address that matter further. *See Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006) (holding that the Court is unable to find error when arguments are undeveloped). Remand is required for the Board to provide reasons and bases adequate to support appellate review. *Gilbert*, 1 Vet.App. at 57; *Tucker v. West*, 11 Vet.App. 369, 374 (1998) (remand is the

appropriate remedy "where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate"). On remand, the appellant is free to submit any additional evidence and argument, including the arguments raised in his brief to this Court, in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order), and the Board must consider any such evidence or argument submitted. See *Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Board shall proceed expeditiously, in accordance with 38 U.S.C. §§ 5109B and 7112.

#### B. Service Connection for a Heart Disorder

The Board is required to consider all theories of entitlement to VA benefits, that are either raised by the claimant or reasonably raised by the record. *Robinson v. Peake*, 21 Vet.App. 545, 553 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009). The Court has jurisdiction to review whether the Board erred in failing to consider such theories, *Barringer v. Peake*, 22 Vet.App. 242, 244 (2008), and we review the Board's factual findings, such as whether a claim has been reasonably raised, under the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4); *Robinson*, 21 Vet.App. at 553.

The appellant asserts that his in-service obesity from his service-connected injuries may be "related to his current CAD because [the appellant] has continued to suffer from obesity since his separation from service" and that in treatment for his CAD, VA had advised him to lose weight. Appellant's Br. at 4. He states that the Board erred by failing to order an adequate VA medical examination to address this theory of entitlement, or, in the alternative, that the Board failed to provide an adequate statement of reasons or bases for why an examination was not required to address this theory of entitlement.

The Secretary asserts that the Board provided an adequate statement of reasons or bases for finding that a VA examination was not required for his heart disorder. Secretary's Br. at 6. In response to the appellant's argument that there is a link between his ankle and knee disabilities limiting his exercise, which caused his obesity, which in turn caused his heart disorder, the Secretary notes that the appellant has not pointed to any evidence indicating his limited ability to exercise or that his obesity caused his heart disorder – only citing a medical record that stated that lowering his weight would help better manage his heart condition. *Id.*

The Court is not convinced that the appellant's theory that his heart disorder is related to his obesity, shown in service, was reasonably raised by the record before the Board. Review of

the evidence of record does not reflect any notation relating the appellant's heart disorder to his obesity. Further, the appellant's lay hypothesizing that his heart disorder is related to his obesity does not support finding that this theory was raised before the Board. *See Kern v. Brown*, 4 Vet.App. 350, 353 (1993) (noting that an appellant's attorney is not qualified to provide medical judgments such as an explanation of the significance of clinical evidence); *Hyder v. Derwinski*, 1 Vet.App. 221, 225 (1991) ("Lay hypothesizing, particularly in the absence of any supporting medical authority, serves no constructive purpose and cannot be considered by this Court."). Without adequate support or explanation for how the theory was explicitly or reasonably raised before the Board, the Court finds that the appellant fails to meet his burden to demonstrate error. *See Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (holding that the appellant bears the burden of demonstrating error on appeal), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table). Because this theory for service connection was not explicitly or reasonably raised below, the Board was not required to discuss it. Accordingly, the appellant's arguments that the Board erred by failing to obtain a VA medical examination to address this theory or that the Board provided an inadequate statement of reasons or bases for not obtaining a VA medical examination to address the theory, fail.

In light of the above, the Court affirms the Board's denial of service connection for a heart disorder, to include CAD.

### **III. CONCLUSION**

Upon consideration of the foregoing, the Court VACATES that portion of the Board's October 20, 2017, decision denying a disability rating in excess of 30% for headaches; REMANDS the matter for further adjudication; and AFFIRMS that portion of the Board decision that denied service connection for a heart disorder, to include CAD.

DATED: March 18, 2019

Copies to:

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VA General Counsel (027)